Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

STEPHEN PERITZ,

Petitioner,

vs.

PAINEWEBBER INCORPORATED,
A Delaware Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a victim of disability discrimination who obtained an excellent result on his ADA claim (a near record recovery), be penalized by reducing the lodestar amount of attorneys' fees simply because he failed to obtain 100% of the relief requested?

2. Whether an arbitrary 25% reduction of the lodestar computation, solely because the prevailing plaintiff failed to obtain 100% of the relief he requested, is in direct conflict with decisions of the Supreme Court which hold that there is a strong presumption the lodestar amount represents a reasonable fee?

LIST OF PARTIES

The only parties are those listed in the caption.

RULE 29.6 STATEMENT

Petitioner does not know whether there is any publicly held company holding more than 10% of Respondent PaineWebber's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
FACTS MATERIAL TO QUESTIONS PRESENTED	3
ARGUMENT	6
I. Certiorari Should Be Granted On The Question Of Whether A Victim Of Disability Discrimination Who Obtained An Excellent Result (A Near Record Recovery), May Be Penalized By Reducing The Lodestar Amount Of Attorneys' Fees, Simply Because He Failed To Obtain 100% Of The Relief Requested	7
II. Certiorari Should Be Granted On The Question Of Whether An Arbitrary Percentage Reduction Of The Lodestar Amount, Solely Because The Plaintiff Obtained Less Than 100% Of The Relief Requested, Is In Direct Conflict With The Decisions of This Court	11
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541 (1984) 11

City of Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638 (1992) 11

Coutin v. Young & Rubicam, 124 F.3d 331 (1st Cir. 1997) 7, 9, 10, 12

Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983) 7, 8, 9, 10, 12

Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 106 S. Ct. 3088 (1986) 11

STATUTES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 12205 2

42 U.S.C. § 12217 2

42 U.S.C. § 2000(e)-5(k) 2

42 U.S.C. § 12101 *et seq* 3

OTHER

National Enforcement Plan adopted during 1995, The Equal Employment Opportunity Commission, Section VIII 6

PETITION FOR WRIT OF CERTIORARI

Stephen Peritz respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals (App. 1), is unreported. 52 Fed. Appx. 487, ___ F.3d ___ (Table), 2002 WL 31415764 11th Cir. (Fla.). The opinion of the district court (App. 2), is unreported.

STATEMENT OF JURISDICTION

This Petition for Writ Of Certiorari raises an important commonly recurring issue of law involving statutorily mandated awards of reasonable attorneys' fees to prevailing plaintiffs; to wit: May a court discount the lodestar amount merely because the plaintiff failed to obtain 100% of all the relief sought where only a single count was involved, notwithstanding the fact that he obtained an excellent result. There is a manifest and fully developed conflict between the decision of the Eleventh Circuit below and decisions of this Court and of the First Circuit which hold that in determining any discount of the lodestar amount, the courts must evaluate the results actually obtained in absolute terms; and, may not rely simply on a comparison to the relief sought.

The judgment of the Eleventh Circuit Court of Appeals was entered on October 16, 2002. An Order denying a timely petition for rehearing *en banc* was entered on

January 29, 2003. (App. 11). This Petition for a Writ of Certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

As the prevailing party in an action under the Americans With Disabilities Act ("ADA"), Petitioner is entitled to recover "reasonable attorneys fees" (42 U.S.C § 12205):

> "§ 12205. Attorney's fees
>
> In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs. . . . "

In addition, 42 U.S.C. § 12217 of the ADA provides plaintiffs in ADA cases with "the powers, remedies, and procedures set forth in" certain sections of the Civil Rights Act, including 42 U.S.C. § 2000(e)-5(k), which also provides for the award of reasonable attorney's fees.

> "(k) Attorney's fee. . .
>
> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs. . . . "

STATEMENT OF THE CASE

Stephen Peritz ("Peritz"), a stockbroker, brought this action against his employer, PaineWebber Incorporated ("PaineWebber"), in the United States District Court for the Southern District of Florida seeking damages for disability discrimination in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. The jury found that PaineWebber discriminated against Peritz in violation of the ADA and awarded back pay in the amount of $917,000. Final judgment for Peritz was entered on June 5, 2001 and the Eleventh Circuit entered its *per curiam* affirmance thereof on June 25, 2002. 45 Fed. Appx. 877, ___ F.3d ___ (Table), 2002 WL 1417506.

As the prevailing party, Peritz filed his Motion for Attorneys' Fees and to Tax Costs. The magistrate judge entered the Report and Recommendation – Attorneys' Fees and Costs (App. 13) and the trial judge subsequently adopted the Report and Recommendation in its entirety. (App. 9). Peritz appealed from the trial court's application of a 25% "degree of success" discount of the lodestar fee amount. PaineWebber cross appealed. The Eleventh Circuit entered its *per curiam* decision, *sub judice*, affirming the 25% degree of success discount based solely on the fact that Peritz did not obtain all the relief he requested. (App. 1).

FACTS MATERIAL TO QUESTIONS PRESENTED

Peritz filed a single count complaint alleging violation of the ADA and containing the following prayer for relief:

> "... lost wages and benefits, both past and future, that he would have earned if he had not

> been wrongfully terminated, for compensatory damages and for punitive damages all in excess of $2,000,000.00, together with reasonable attorneys fees and costs, and such other relief as appears just and reasonable."

On July 5, 2000, the District Court granted Peritz's Motion for leave to amend the complaint to add four additional counts. Peritz served the amended complaint on or about July 13, 2000. Forty-seven (47) days after service of the amended complaint, the parties stipulated that the new Counts II through V would be submitted to arbitration so that only the single original count (the ADA action), would be tried.

On March 30, 2001, the jury found PaineWebber discriminated against Peritz in violation of the ADA and awarded back pay in the amount of $917,000 on that single ADA count which was tried. **This is one of the highest total awards ever for a single Plaintiff in an ADA case and was exactly the amount Peritz requested from the jury for back pay**. Peritz's prayer for front pay was resolved by the district judge who awarded none. The district judge also entered judgment for PaineWebber on Peritz's prayer for punitive damages.

Following trial, Peritz filed a Motion for Attorneys' Fees and to Tax Costs seeking compensation only for attorneys' hours expended in connection with the single ADA claim contained in the original complaint which went to trial.

There was no issue in this case as to the allocation of time between successful and unsuccessful causes of action. As noted above, Peritz prevailed on the only count which was tried (i.e., the ADA action). The relatively minimal

time relating to the non-ADA claims that went to arbitration was segregated out and Peritz did not seek any compensation for this time. Therefore, none of the time for which Peritzs' counsel sought compensation involved unsuccessful, severable claims.

In The Report and Recommendation – Attorneys' Fees and Costs (hereinafter the "Recommendation") the magistrate judge made specific findings as to the reasonable number of hours expended and the reasonable hourly rates for Peritzs' attorneys. This results in a lodestar computation of $656,658.60. However, based solely on the fact that Peritz "only" recovered a judgment in the amount of $917,000, but failed to obtain all the damages he requested in that count, the Recommendation reduced the lodestar computation by 25% due to Peritz's "degree of success" stating (App. 18):

> "Defendant asserts that plaintiff made unsuccessful claims for front pay, compensatory damages (which plaintiff later withdrew), reinstatement, and punitive damages. Defendant further suggests that plaintiff sought, but failed to receive, several million dollars for his front pay claim."

Over Peritz's objection, the district court adopted the Recommendation and awarded attorneys fees in the reduced amount of $471,296.85, instead of the $656,658.60 lodestar amount. (App. 9 and 28). Peritz then sought review of this issue before the Eleventh Circuit Court of Appeals.

Based solely and expressly on a comparison of the relief Peritz obtained with the relief he requested, the Eleventh Circuit affirmed the 25% degree of success discount, stating (App. 7):

> "In this case, the district court properly compared the relief Peritz obtained with the relief he requested. Upon review of the record, we conclude the district court did not abuse its discretion by ordering a 25% reduction of the lodestar computation to account for Peritz's degree of success."

Peritz filed a petition for rehearing en banc that raised the question presented in this Petition. On January 29, 2003, the Eleventh Circuit Court of Appeals denied rehearing. (App. 11).

ARGUMENT

The subject opinion would impede the quest to obtain legal representation of all victims of statutorily prohibited discrimination. In its National Enforcement Plan adopted during 1995, The Equal Employment Opportunity Commission specifically acknowledges the critical role played by the private bar in enforcing these civil rights laws (at Section VIII):

> "The Commission recognizes that it may not be able to litigate every case that fails conciliation, including cases which fall within the National and Local Enforcement Plans. Thus, the Commission encourages the General Counsel, District Directors, and Regional Attorneys to work closely with the private bar, which continues to play a critical role in civil rights enforcement."

Moreover, the rule approved in the case at bar (i.e., comparison of the damages obtained to damages sought as an independent basis for decrease of the lodestar amount), would apply and authorize reductions in virtually every

single determination of reasonable attorneys fees, regardless of the nature of the underlying case.

Under established precedent, *infra*, the lodestar fee amount (reasonable number of hours times reasonable hourly rates), is the presumed "reasonable fee." A prevailing plaintiff who is statutorily entitled to recover attorneys' fees and who obtains an excellent result, should not be subjected to an arbitrary percentage reduction of the lodestar fee amount merely because he did not obtain 100% of the damages he requested. The decision *sub judice,* authorizing such reductions, destroys any semblance of objectivity in fee determinations and conflicts with established precedent of this Court and of the First Circuit, *infra*.

I. Certiorari Should Be Granted On The Question Of Whether A Victim Of Disability Discrimination Who Obtained An Excellent Result (A Near Record Recovery), May Be Penalized By Reducing The Lodestar Amount Of Attorneys' Fees, Simply Because He Failed To Obtain 100% Of The Damages Requested.

In direct conflict *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983); and, *Coutin v. Young & Rubicam*, 124 F.3d 331 (1st Cir. 1997), the decision *sub judice* affirms an arbitrary 25% reduction of the lodestar fee amount solely because Peritz did not receive all of the relief he sought (App. 7):

> "In this case, the district court properly compared the relief Peritz obtained with the relief he requested. Upon review of the record, we conclude the district court did not abuse its discretion by ordering a 25% reduction of the lodestar

> computation to account for Peritz's degree of success."

Peritz obtained a large, near record recovery on the only count involved – violation of a civil rights statute, the ADA. *Hensley* specifically acknowledges that in awarding fees, it is not significant that a prevailing plaintiff did not obtain all the relief requested as long as "the relief obtained justified that expenditure of attorney time" (461 U.S. at 435):

> "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. See *Davis v. County of Los Angeles,* 8 E.P.D. ¶ 9444, at 5049 (CD Cal.1974). Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters. [FN11]
>
> FN11. . . . Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time."

Hensley applies common sense in mandating evaluation of the results actually obtained – not simply the relief sought – in determining the degree of success.

In *Hensley,* this Court recognized a basic dichotomy between unrelated claims and those which "involve a common core of facts or will be based on related theories." 461 U.S. at 435. Where, as in the case at bar, the claims for relief involve a "common core of facts" (in fact, a single count), the district court is required to "focus on the significance of the overall relief obtained by the plaintiff. . . . " 461 U.S. at 440. Under *Hensley,* because the $917,000 judgment, one of the highest ADA awards ever made to a single plaintiff, constitutes "substantial relief," any discount is expressly forbidden (461 U.S. at 440):

> "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised."

The ruling *sub judice* is also in direct conflict with *Coutin v. Young & Rubicam*, 124 F.3d 331 (1st Cir. 1997). In *Coutin,* the First Circuit specifically rejected use of the ratio of damages requested to judgment received as an independent justification for reduction of the lodestar amount. The First Circuit stated that where the plaintiff prevailed in a single count complaint she had obtained a: "100% success rate – and complete success is hardly limited." 124 F.3d at 340. *Coutin* analyzed success from the standpoint of the relief obtained and found that the trial judge erred in relying on the ratio of the damages requested to the judgment received (124 F.3d 340):

> "The court may not employ the derived ratio as an independent justification for a fee reduction. See *Rivera,* 477 U.S. at 574, 106 S. Ct. at 2694."

Noting that the $45,538 damage award there was equivalent to three years of plaintiff's salary, *Coutin* held that the award was substantial in absolute terms and (notwithstanding an overly optimistic prayer for relief in excess of $1.5 million), did not indicate limited success in any relevant sense to justify a reduction of the lodestar computation. In comparison, in the case at bar, the $917,000 back pay award compensated Peritz for approximately five years of salary (1996 through trial in 2001), and likewise is substantial in absolute terms.

The decision *sub judice* is the only case upholding a reduction of the lodestar figure for "degree of success" where there is no issue of allocation of time among successful versus unsuccessful causes of action; and, there is a substantial verdict ($917,000) which exceeds the lodestar amount ($656,658.60). On these facts, such a discount has *never* been found to be proper.

Under well established principles, the amount recovered, or results obtained, is an important factor in awarding attorneys fees. However, the Eleventh Circuit, directly in conflict with decisions of this Court and of the First Circuit, *supra*, gives no weight to the fact that the amount recovered was indeed excellent. The research of undersigned counsel reveals that it ranks within approximately the top 6 published awards to a single plaintiff in any ADA case in U.S. history. In affirming a "degree of success" discount, the Eleventh Circuit totally disregards that success and, in direct conflict with *Hensley* and *Coutin, supra,* reduces attorneys' fees solely because the plaintiff

did not obtain all the relief requested in the single count at issue.

II. Certiorari Should Be Granted On The Question Of Whether An Arbitrary Percentage Reduction Of The Lodestar Amount, Solely Because The Plaintiff Obtained Less Than 100% Of The Damages Requested, Is In Direct Conflict With The Decisions of This Court.

This Court has repeatedly stated there is "a strong presumption" that the lodestar amount represents a reasonable fee. *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 2641 (1992): "The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee. . . . " *Blum v. Stenson*, 465 U.S. 886, 897, 104 S. Ct. 1541, 1548 (1984): ". . . when . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee. . . . " Also, *Pennsylvania v. Delaware Valley Citizens' Council,* 478 U.S. 546, 565, 106 S. Ct. 3088, 3098 (1986), stating: "A strong presumption that the lodestar figure – the product of reasonable hours times a reasonable rate – represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute. . . . "

In abandoning the lodestar figure, neither the trial court nor the opinion *sub judice,* offer any explanation as to how the 25% discount figure was calculated. The discount is not related to hours expended on counts where Peritz did not prevail – because no such time was claimed. The discount is not related to time expended seeking front

pay and punitive damages because that time was nominal and there are no findings in that regard. The discount is not proportional to the $917,000 judgment amount verses the amount sought – because that would result in a significantly greater reduction. In short, there is no hint of the criteria utilized to determine that 25% is the appropriate discount percentage.

It is respectfully suggested that the law cannot reasonably require a trial judge to make finely tuned objective findings of fact as to the reasonable hourly rates and reasonable number of hours expended, and then allow him to subjectively apply any arbitrary discount percentage whenever the plaintiff's damage recovery is less than the amount requested. Such a subjective discount effectively destroys all objectivity in fee determinations.

CONCLUSION

In approving arbitrary percentage reductions of the lodestar amount whenever a plaintiff fails to obtain all requested relief – notwithstanding an excellent verdict in a near record amount, the decision *sub judice* is in direct and absolute conflict with *Hensley* and the First Circuit's decision in *Coutin*, *supra*. Moreover, in conflict with the numerous decisions emphasizing the fundamental importance of the lodestar calculation, *supra*, the total arbitrariness of the subject discount would eliminate objectivity in determining a reasonable fee in every case where a plaintiff obtains less than all the damages sought.

Wherefore, Petitioner respectfully submits that these considerations justify granting the Petition.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12936
Non-Argument Calendar

D.C. Docket No. 99-09072-CV-PCH

STEPHEN PERITZ,

Plaintiff-Appellant-Cross-Appellee,

versus

PAINEWEBBER, INCORPORATED,
a Delaware Corporation

Defendant-Appellee-Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(Filed October 16, 2002)

Before ANDERSON, DUBINA, and BLACK, Circuit Judges.

PER CURIAM:

This case involves the calculation of an attorneys' fee award in a discrimination case under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101-12213. At his jury trial, plaintiff Stephen Peritz (Peritz) was awarded back pay of $917,000 against his former employer, PaineWebber, Inc. (PaineWebber); his request for front pay was denied by the district court. Following trial, Peritz requested attorneys' fees in the amount of $925,000. After reducing some of the attorneys' hourly rates and the number of hours allowed as reasonable in its lodestar

computation, and further reducing the lodestar to account for Peritz's degree of success, the district court ordered attorneys' fees in the amount of $471,296.85. On appeal, Peritz challenges the degree of success discount and the method of calculating the reductions as to one of his attorneys. Cross-appellant PaineWebber challenges the hourly rates set for Peritz's attorneys and the number of hours disallowed as excessive. We affirm as to the appropriate hourly rates, the number of hours disallowed as excessive, and the degree of success discount, and remand for recalculation of the reductions as to one of the attorneys.

I. BACKGROUND

Peritz filed suit against PaineWebber, alleging his former employer discriminated against him and failed to accommodate him in violation of the ADA. In his initial complaint, Peritz sought compensatory damages, back pay, front pay, and punitive damages. After a jury trial, Peritz received a favorable verdict on his claim, and the jury awarded him $917,000 in back pay. The district court, however, denied Peritz the equitable remedy of front pay granted judgment as a matter of law to PaineWebber on the issue of punitive damages.

Following the verdict in his favor, Peritz filed a motion for attorneys' fees in the amount of $925,000. After reviewing the time records and other documents submitted by Peritz's attorneys, the court set reasonable hourly rates for each of Peritz's attorneys: $240 for Steven Weissman, $275 for David Freedman, $165 for Jennifer Rawicz, and $250 for Alice Hector. Additionally, prior to multiplying these rates by the number of hours reasonably

expended by each attorney, the court determined Mr. Weissman's hours should be reduced by 15% for excessiveness. This resulted in a lodestar calculation, i.e., the product of the reasonable hourly rates multiplied by the hours found to be reasonable and necessary, of $656,658.60. Finally, the court determined the lodestar amount should be reduced by 25% due to Peritz's degree of success. Thus the attorneys' fees awarded by the district court totaled $471,296.85. This appeal and cross-appeal followed.

II. STANDARD OF REVIEW

We review a district court's "'award of attorneys' fees for abuse of discretion; nevertheless, that standard of review still allows us to closely scrutinize questions of law decided by the district court in reaching a fee award.'" *Villano v. City of Boynton Beach,* 254 F.3d 1302, 1304 (11th Cir. 2001) (quoting *Clark v. Hous. Auth. of Alma,* 971 F.2d 723, 728 (11th Cir. 1992)).

III. DISCUSSION

Both Peritz and PaineWebber appeal the amount of attorneys' fees awarded. Peritz argues the district court erred in applying a degree of success discount to the lodestar calculation of his attorneys' fees. In the alternative, he argues the district court erred in calculating Mr. Weissman's fee by applying the 15% reduction for excessive hours and the 25% discount for degree of success as a single 40% discount, rather than first calculating the appropriate lodestar amount by applying the 15% reduction in Mr. Weissman's hours and then taking the 25% reduction. In its cross-appeal, PaineWebber argues the

hourly rates for Mr. Weissman and Mr. Freedman were excessive in light of Mr. Weissman's lack of experience in the employment litigation area, and in what PaineWebber calls excessive and duplicative work by both attorneys. PaineWebber also argues the district court abused its discretion by only discounting Mr. Weissman's time by 15% to account for excessiveness.

A. Hourly Rate

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart,* 103 S. Ct. 1933, 1939 (1983). "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Hous. Auth. of Montgomery,* 836 F.2d 1292, 1299 (11th Cir. 1988). Although we generally review the district court's award of attorneys' fees for abuse of discretion, "'the determination of what constitutes a reasonable hourly rate is a finding of fact subsidiary to the total award and is therefore reviewed under the clearly erroneous standard.'" *Brooks v. Ga. State Bd. of Elections,* 997 F.2d 857, 868 (11th Cir. 1993) (quoting *Turner v. Sec'y of the Air Force,* 944 F.2d 804, 808 (11th Cir. 1991)).

The district court adopted an hourly rate of $240 for Mr. Weissman. PaineWebber argues the rate set for Mr. Weissman was unreasonable due to his lack of experience in the employment litigation area. However, the district court took this lack of experience into consideration when reducing Mr. Weissman's fee from his requested rate of

$300 an hour to $240 an hour. The district court selected a rate of $240 based on Mr. Weissman's considerable time as a practitioner and on his litigation experience. Additionally, the court noted the fee recommended by PaineWebber's expert, $175, was a mere $10 higher than the $165 fee recommended for Ms. Rawicz, a third-year associate. Finding that a reasonable fee for a seasoned lawyer should significantly exceed that of a third-year associate, the court ultimately set Mr. Weissman's fee at a rate between that set for the third-year associate and that set for Mr. Freedman, a highly experienced litigator. The hourly rate set for Mr. Weissman was not clearly erroneous and, therefore, we affirm.

PaineWebber also argues with regard to both Mr. Weissman and Mr. Freedman that the district court erroneously failed to reduce the attorneys' hourly rates when they were performing non-legal clerical tasks and lower-level research and drafting work. The court, however, carefully reviewed the attorneys' time records to determine whether they should be compensated for all hours billed. In doing so, the district court disallowed certain hours claimed by Mr. Freedman that it considered excessive or duplicative, and it applied a 15% reduction to Mr. Weissman's hours for excessiveness. Thus, the district court took into account the nature of the activities actually performed by both attorneys. The district court did not abuse its discretion in declining to reduce the attorneys' hourly rates when performing such work.

B. Excessive Hours

PaineWebber argues the district court abused its discretion by failing to sufficiently reduce the hours

claimed by Peritz's attorneys to account for excessive and duplicative work. After reviewing the record and the parties' briefs, we conclude the district court did not abuse its discretion when reducing the number of hours allowed in Peritz's lodestar computation. The district court noted specific examples of excessive or duplicative time claimed by Peritz's attorneys, and it properly discounted for this time. Although the district court was hindered from discounting specific hours due to inadequate separation of time records by Peritz's attorneys, the court examined the records in detail and, based on the records as available, discounted a fair percentage of the overall hours in order to account for excessiveness. Such actions did not constitute an abuse of discretion.

C. Discount for Degree of Success

The district court reduced the attorneys' fee award by 25% to account for the degree of success Peritz achieved in this case. The Supreme Court approved such reductions in *Hensley v. Eckhart.* 103 S. Ct. at 1941. There, the Court stated "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* The Court concluded, though, where "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* In such situations, therefore, "[t]he district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.*

Although Peritz acknowledges fee reductions are appropriate in certain cases, he argues a reduction is not

justified here because he obtained a favorable jury verdict on his only claim. He argues the fee should not be reduced simply because he did not receive all the damages he requested in his prayer for relief. This Court, however, has held that the damages awarded are not irrelevant in a district court's computation of attorneys' fees. In *Popham v. City of Kennesaw,* a prevailing civil rights plaintiff argued the district court erred in gauging the extent of his success by comparing the damages received against those sought. 820 F.2d 1570, 1580 (11th Cir. 1987). We stated "the relief a plaintiff requested is indeed relevant to determining the extent of that plaintiff's success," and held the district court committed no error by comparing the damages the plaintiff sought with those he actually received. *Id.* at 1580-81. In *Villano Beach v. City of Boynton,* we again noted "'[t]he amount of damages a plaintiff recovers is certainly relevant to the amount of attorneys' fees to be awarded'" in civil rights cases, 254 F.3d at 1306 (quoting *City of Riverside v. Rivera,* 106 S. Ct. 2686, 2694 (1986)). Furthermore, we stated that "we reject the arguments that the size of an award is irrelevant as a matter of law and that a jury verdict alone proves success to have been complete." *Id.*

In this case, the district court properly compared the relief Peritz obtained with the relief he requested. Upon review of the record, we conclude the district court did not abuse its discretion by ordering a 25% reduction of the lodestar computation to account for Peritz's degree of success.

D. Calculation of the Lodestar and Reduction for Degree of Success

Peritz argues the district court committed a clerical error when calculating Mr. Weissman's fee by adding together the 15% excessiveness discount and 25% degree of success discount, resulting in a single 40% discount. Peritz contends the district court should have applied the discounts successively. We agree. "First, the court should calculate the lodestar amount – the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Having calculated that amount, the court can then reduce the lodestar to reflect the plaintiff's partial success." *Popham v. City of Kennesaw,* 820 F.2d at 1578 (internal citation omitted). A degree of success reduction should be applied after the lodestar amount is determined, not contemporaneously therewith. We remand to the district court for correction of this clerical error.

VI. CONCLUSION

The district court did not clearly err in setting hourly rates for Mr. Weissman and Mr. Freedman, and did not abuse its discretion in setting the reasonable number of hours expended by Peritz's attorneys. Likewise, the district court did not abuse its discretion by reducing the fee award for the degree of success Peritz obtained in this case. The district court, however, committed a clerical error in combining the excessiveness discount on Mr. Weissman's hours and the degree of success discount into a single 40% reduction.

AFFIRMED in part, and REMANDED in part.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 99-9072-CIV-HUCK-BROWN

STEPHEN PERITZ,

Plaintiff,

vs.

PAINWEBBER,
INCORPORATED,

Defendant. /

ORDER AFFIRMING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed Apr. 30, 2002)

THIS CAUSE comes before the Court upon the Report and Recommendation of the Honorable Stephen T. Brown, United States Magistrate Judge, on the Plaintiff's Motion for Attorneys' Fees and Costs, filed July 12, 2001 [DE#365-1 and 365-2].

The Court has considered the objections and responses to the objections filed by PaineWebber, Inc. and Stephen Peritz. After a *de novo* review, the Court finds that after a careful and thorough review of the record Magistrate Judge Brown made a substantial and appropriate downward adjustment of the fee and cost request. This was a very extensive, contentious litigation, which accounts in large part for the amount of fees Plaintiff seeks to recover. Being otherwise duly advised, the Court agrees with Magistrate Judge Brown's Report and Recommendation, dated March 28, 2002. Accordingly, it is hereby

ORDERED that the Report and Recommendation of Magistrate Judge Brown be RATIFIED, AFFIRMED, and made the Order of the District Court. The motion for fees and costs [DE#365] is GRANTED. Plaintiff's related motion to set a date for the filing a motion for attorneys' fees and costs [DE#350] is DENIED as moot.

DONE in Chambers, Miami, Florida, this 30th day of April, 2002.

/s/ Paul C. Huck
Paul C. Huck
United States District Judge

Copies furnished to:
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-12936-EE

STEPHEN PERITZ,

Plaintiff-Appellant-
Cross-Appellee,

versus

PAINEWEBBER, INCORPORATED,
a Delaware Corporation,

Defendant-Appellee-
Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Jan. 29, 2003)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (opinion _____, 11th Cir., 19___, ___ F.2d ___).

BEFORE: ANDERSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal

Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 99-9072-CIV-HUCK

STEPHEN PERITZ,

Plaintiff,

vs.

PAINWEBBER,
INCORPORATED,
(A Delaware Corporation),

Defendant. /

REPORT AND RECOMMENDATION – ATTORNEYS' FEES AND COSTS

(Filed Mar. 29, 2002)

This matter is before this Court on Plaintiff's Motion for Attorneys' Fees and Costs filed July 12, 2001. The Court has considered the motion, the response, the reply, the affidavits in support of the party's positions, and considered all pertinent materials in the file.

Background

This protracted litigation arose out of a discrimination claim by plaintiff under the Americans With Disabilities Act. It ultimately resulted in a jury verdict of back pay for plaintiff in the sum of $917,000. Plaintiff received no other compensation, including but not limited to a denial of his claim for future compensation. There is no dispute over entitlement to fees, only the amount of same. Defendant responds to the claim for fees by making, essentially, three arguments: (1) this case was "over-litigated"; (2) the claim

for an hourly rate sought is excessive as plaintiff's litigators were inexperienced in this type of litigation; and (3) because of that inexperience (among other factors), the hours incurred are excessive.

Any fees to be awarded must be reasonable and follow the guidelines the Eleventh Circuit has promulgated. *See, e.g., Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988). It is the prevailing party's burden to justify the requested fees. *Duckworth v.* [illegible], 97 F.3d 1393, 1396 (11th Cir. 1996); *see, e.g., Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994). However, the Eleventh Circuit has repeatedly held that the court itself can be an expert on the question and may properly consider its own knowledge and experience in determining reasonable and proper fees. *Loranger*, 10 F.3d at 781. The District court has the ultimate discretion in determining whether or not a party to a case should receive an award of fees. *See Cullens v. Georgia Dept. of Transp.*, 29 F.3d 1489, 1491 (11th Cir. 1994). Moreover, the District Court has the authority to determine the precise amount of a particular fee award. *Id.*

The standards to be applied are set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).[1] The court noted that the "starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at

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[1] Although *Hensley* involved attorney's fees under 42 U.S.C. § 1988, the U.S. Supreme Court stated that "[t]he standards set forth in [*Hensley*] are generally applicable in *all cases* in which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n.7 (emphasis added).

433. This is referred to as the "lodestar" method,[2] which has been adopted by the Eleventh Circuit as the proper method to calculate fee awards in federal statutory fee-shifting cases. *See, e.g., Duckworth*, 97 F.3d at 1396; *Loranger*, 10 F.3d at 781. However, the degree of success obtained is also germane, even in the "public benefit" type of case such as this. *See Villano v. City of Boynton Beach*, 254 F.3d 1302 (11th Cir. 2001).

As to the argument that the case was over litigated, this Court agrees. However, this Court would also note that defendants contributed to the over-litigation. Thus, while some consideration must be given to this factor – and will be as it regards the reasonable number of hours compensable, the role of the defendant in this matter is a contributing factor and will likewise be considered.

The other two arguments make for an interesting "Catch-22" situation. On one hand, defendant wants this court to lower the hourly rate plaintiff seeks on the basis of a lack of experience in this area of litigation. On the other hand defendant wants the number of hours reduced because of excessive work that experience in this area would have avoided. The proper resolution of this "quandary" is to reduce the hourly rate and not the number of hours attributed to the inexperience. *See, e.g., Perkins v. Mobile Housing Board*, 847 F.2d 735 (11th Cir. 1988);

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[2] The U.S. Supreme Court has declared that the lodestar as calculated in *Hensley* presumptively includes all of the twelve factors derived from the ABA Code of Professional Responsibility Dr. 2-106 (1980) and adopted in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). *Norman* 836 F.2d at 1298-1299.

Desisto College, Inc. v. Town of Howey-In-The-Hills, 718 F. Supp. 906 (M.D. Fla. 1989).

Reasonable Hourly Rate

"A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman*, 836 F.2d at 1299 (citing *Blum v. Slonson*, 465 U.S. 886, 895-96 n. 11 (1984)). The applicant bears the burden of producing satisfactory evidence that the rate requested is in line with prevailing market rates. Satisfactory evidence is more than the affidavit of the attorney performing the work and must speak to the rates actually billed and paid in similar lawsuits.

The parties do not have serious disagreement over the hourly rate for attorney Rawicz, so an hourly rate for her work of $165.00 will be recommended. As it regards attorney Freedman, while he has unquestioned experience as a litigator, he is not an employment law specialist and doesn't claim to be. This Court finds defendant's expert to be fair – and persuasive – and will recommend an hourly fee of $275.00 for Mr. Freedman's work.

Mr. Weissman's situation is more complex. Due to his undisputed lack of experience in the area of this litigation, this Court cannot accept plaintiff's expert's opinion, nor Mr. Weissman's request for compensation at the rate of $300.00 per hour. There is nothing to support that an attorney with Mr. Weissman's experience (or lack thereof) in employment litigation should be compensated at a market rate of $300.00 per hour. On the other hand, Mr. Weissman's legal experience demands an hourly rate in excess of the $175.00 suggested by defendant's expert. A

mere $10.00 more than a third year associate (no disrespect meant to Ms. Rawicz,) is not justified for an attorney who has 28 years of litigation experience, some of it of a substantial nature. This Court finds that an hourly rate of $240.00 will fairly compensate Mr. Weissman in light of the prevailing market rate in South Florida.

Reasonable Number of Hours

The Eleventh Circuit requires proof of the hours spent on litigation. *See Duckworth*, 97 F.3d at 1397. Where there is a lack of documentation of testimonial support for the hours expended the court may make the award based on its own experience. *Loranger*, 10 F.3d at 781 (citing *Norman*, 836 F.2d at 1303). This Court finds the documentation to be generally adequate. However, records lumping together all tasks performed on a given day by counsel without breaking out the specific time devoted to each task are frowned upon. *See, e.g., ACLU of Georgia v. Barnes*, 168 F.3d 423 (11th Cir. 1999). The *Loranger* decision is particularly relevant here because the Eleventh Circuit noted that in some cases it is impractical for the court to review, hour by hour, the billable entries. *Id.* at 783. Notwithstanding that fact, this Court has reviewed the time entries for which plaintiff seeks fees.

Excessive, redundant or otherwise unnecessary hours should be excluded from the amount claimed. *Norman*, 836 F.2d at 1301 (citing *Hensley*, 461 U.S. at 434); *see also Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1387, 1389 (11th Cir. 1997). "In the final analysis, exclusions for excessive or unnecessary work on given tasks must be left to the discretion of the district court." *Norman*, 836 F.2d at 1301.

As noted, supra, the degree of success is a significant factor to be considered. *See Hensley*, 461 U.S. 435; *Villano*, supra. District Courts have been told to reduce awards or eliminate hours to reflect the success of a plaintiff. *See Hensley*, 461 U.S. at 437. Defendant asserts that plaintiff made unsuccessful claims for front pay, compensatory damages (which plaintiff later withdrew), reinstatement, and punitive damages. Defendant further suggests that plaintiff sought, but failed to receive, several million dollars for his front pay claim. (See page 2 of the Opposition Memorandum). It is noted that plaintiff did not address these issues in his reply memo – seeking primarily to discuss discovery violations of defendant and sanctions related thereto. One of the problems herein is that plaintiff's focus has frequently been more in the "sanctions" arena than in the "merits" arena. In any event, the purpose of awarding attorney's fees at this stage of the proceedings is to award reasonable compensation – not to punish or sanction any party.

There are excessive and non-compensable hours in Mr. Weissman's time records. For example, entries for review of defendant's disability insurance and Florida's Civil Theft Statute are not appropriate for consideration. A claim for 4.0 hours for in part, doing a study of employee loan documents (4/21/00) leaves more questions than answers, as does a .5 hour claim for drafting a letter to Paine Webber (4/19/00). Why one half hour for a simple letter? If not a simple letter – where is the documentation? Why a letter to Paine Webber when they are represented by counsel (*see, e.g.*, time entry of 5/12/00 – "draft letter to attorney DeBlasio)?

Forgetting for the moment what may, or may not be, excessive preoccupation with discovery fights, the hours

devoted to the preparation of the motions are excessive. For example, on 5/31/00 there is a time entry of 7.5 hours for drafting a letter to opposing counsel and "outlining' motions to compel. Two letters to opposing counsel that appear, based on the description of the work done, to be relatively straightforward, bear 2.2 hours of time (6/5/00). Some non-defined parts of 43 hours (5/30/00-6/7/00) are devoted to drafting a motion to compel discovery. Counsel has an entry of 7.0 hours for drafting a motion for continuance and a telephone call, with his client (9/26/00), and additional time is claimed for the same motion on the next day time entry. A similar amount of time is claimed to prepare a motion to continue the trial (10/2/00 and 10/3/00). Motions to Compel were drafted for the third request for documents and answers to the third set of interrogatories. It appears that in excess of *fifty* (50) hours were devoted to that task – to say nothing of the time devoted to the reply memo.

The Court notes that substantial hours were devoted to plaintiff's cross-motion for summary judgment which was filed, re-filed, and ultimately denied. It is worth repeating that these are examples only, and are not intended to be all-inclusive. Based on this review of the time records and the information derived therefrom, this Court recommends that Mr. Weissman's compensable hours be reduced by 15% for excessiveness, and an additional 25% for the degree of success factor, leaving the total of 1,430.64 compensable hours.

Reviewing the time records for Mr. Freedman and Ms. Rawicz yields a similar result. There are numerous entries for what appears (in the absence of sufficient explanation) to be duplication of work done. For example, both lawyers billed for attending the calendar call (twice) when there is

no showing as to why this was necessary. Both had several entries for review of defendant's documents. Both billed for review of trial exhibits, without explanation as to why. Both billed for research on the same post trial motions. Excessive hours were billed for certain items, including but not limited to the review, research, and preparation of jury instructions – by both attorneys. (*See, e.g.*, entries for March 1, 2001, March 2, 2001 (2), March 4, March 5 (2), March 22, and March 28, 2001. Some entries, particularly regarding Mr. Freedman, were lacking in explanation. (*See, e.g.*, February 20, 2001 – "confer on issues"; February 26, 2001 – "cases on need to dialogue in flexible fashion," "ongoing trial preparation" –numerous entries without explanation; April 17, 2001 and April 18, 2001 – "continued research" . . . with no clear explanation as to what was being researched). These are only examples and were not eliminated, but the number of compensable hours was reduced.

After considering all of the above, this Court finds that Mr. Freedman should be compensated for 433.4 hours and Ms. Rawicz should be compensated 306.4 hours. This Court will also note that while Ms. Rawicz' hourly rate was not reduced for her lack of experience, she is not entitled to compensation for activities such as "research re: Federal Civil Procedure issues including the use of telephone depositions" (February 25, 2001); "research re: filing of the interrogatories answers for use at trial; the use of expert depositions at trial; federal subpoena powers" (February 27, 2001); and "research re: good cause for allowing expert testimony" (February 28, 2001). These are law school type matters which either should not be compensated or, alternatively, are a basis to reduce the hourly rate. Finally, this Court agrees that, while for convenience

it may have been desirable to have three attorneys at the trial, there is an insufficient showing that compensation for all three is appropriate.

There is another requested item totaling $6,955.00 for fees for various other lawyers in Broad and Cassell (of which Mr. Freedman is a partner). There is no information about those attorneys to indicate their years of experience as a practicing lawyer, their experience in this area of litigation, or anything else that would help to determine a reasonable hourly rate for their services. Therefore, with one exception, this Court recommends not awarding those fees.

The one exception is for the services rendered with regard to attorney Hector, who is known to this Court, and whose years of experience in this community are familiar to this Court, although the extent of her experience in this particular arena is not. Therefore, this Court will recommend awarding compensation for her services at the rate of $250.00 per hour. However, of the 3.40 hours for which compensation is sought, 3.1[illegible] the bulk of that time, is for attending the calendar call. Ms. Hector is the third attorney for whom compensation is sought regarding that activity, Ms. Hector's time should be reduced to two (2) hours of compensation at the aforementioned rate.

With regard to attorneys Freedman, Rawicz, and Hector, this Court has considered the amount of excess hours to be deducted, and therefore no additional reduction should be made for excessiveness. However, their compensation should be reduced by the same 25% as Mr. Weissman for the success factor.

Litigation Expenses and Costs

This Court recognizes that the traditional limits on what costs may be taxed under 28 U.S.C. § 1920 do not apply to requests submitted under 42 U.S.C. § 12205. Reasonable attorneys fees must include reasonable expenses because "attorney's fees and expenses are inseparably intertwined as equally vital components of the costs of litigation." *Mallory v. Harkness*, 923 F.Supp. 1546 (S.D. Fla. 1996), *aff'd* 109 F.3d 771 (11th Cir. 1997) (citing *Dowdell v. City of Apopka*, 698 F.2d 1181, 1190 (1983)). All reasonable expenses incurred in case preparation, or during the course of litigation, may be taxed as costs under § 12205, and there is no bar to complete recovery. *See Dowdell*, 698 F.2d at 1192. The Eleventh Circuit traditionally takes a liberal approach when reimbursing expenses under § 1988. *See Lee v. American Eagle Airlines, Inc.*, 93 F.Supp.2d 1322, 1335 (S.D. Fla. 2000). However, plaintiff bears the burden of submitting a request for expenses that enable the court to determine what expenses were incurred and whether plaintiff is entitled to them. *Id.* This Circuit has previously awarded expenses for telephone calls, postage, mileage, photocopies, and facsimiles. *See Dowdell*, 698 F.2d at 1191-92 (citations omitted). Additionally, expenses have been awarded for courier fees, service of process, and filing fees. *See Mallory*, 923 F.Supp. at 1557-58.

The motion says absolutely nothing about the expenses and costs sought, other than to include them in the appendices. Defendant's opposition to the motion disputes the sufficiency of the justification for the expenses sought – and, in some instances, with good reason. On the other hand, defendant seeks to exclude items such as travel, telephone and postage as overhead, citing district court

cases from Massachusetts and California for support, when defendant should first look to the Eleventh Circuit and would find that these exact costs are approved in this Circuit. *See Dowdell*, 698 F.2d at 1192. Interestingly, this item is a microcosm of this entire case. Defendant cites misleading cases (when there is a binding Eleventh Circuit case on point), and plaintiff, in his reply, also fails to bring this case to the Court's attention and instead spends the time and effort to cite a Third Circuit case, a Fifth Circuit case, and one from the Southern District of Iowa. Additionally, plaintiff seeks costs both in this motion and in a separately filed bill of costs – doing unnecessary work resulting in additional work for defendant and the Court. As if that weren't enough, plaintiff filed a Correction to Plaintiff's Attorney Fee Petition on July 25, 2001, which not only alters the amount being sought for costs and expenses, but apparently now subtracts the sum of $906.00 which allegedly exists in the bill of costs. This "correction" also apparently has a footnote (2) at the end of the first paragraph – but the actual footnote does not appear in the correction.

An attempt to determine if the bill of costs was separately filed and/or the disposition of same has met with negative results. Accordingly this Court recommends that any final decision on this Report and Recommendation take precedence over any order from the clerk on the bill of costs. Defendant makes both general and specific objections to the expenses sought. The general objection is simply that the claims are vague and unspecific and therefore should be disallowed. It should be noted, initially, that the motion is verified, as required, and that, in and of itself gives rise to a basis for allowing expenses, in the absence of a specific showing to the contrary.

A specific objection has been made to the charges for computer research. Computer-assisted legal research is properly disallowed as a cost. *See Breitenbach v. Neiman Marcus Group,* 181 F.R.D. 544 (N.D. Ga. 1998), Plaintiff makes no argument in the reply to contradict this position. Therefore these costs should be disallowed in the total sum of $14,350.00 (see page 18 of the opposition memorandum).

Complaints regarding costs of depositions are adequately rebutted. As it regards the complaint regarding videotaped depositions, contrary to the case defendant cites from the Northern District of Illinois, the Eleventh Circuit has spoken in opposite fashion, *See Morrison v. Roichhold Chemicals, Inc.,* 97 F.3d 460, 464-465 (11th Cir. 1996).

Several additional specific costs are questioned by defendant which, again, were not addressed by plaintiff in the reply (see pages 19-20 of the opposition memo). All of the arguments are reasonable and supportable, and in the absence of contrary explanations, they should be subtracted in the total sum of $8994.00.

Defendant raises specific objections to the expert fees sought. As it regards the fee of Dr. Lessne, there is only a lump sum total of time expended to justify the fee sought. There is a total lack of itemization so as to determine if the time spent was reasonable. Defendant requests that Dr. Lessne's fee be reduced by 50%. Plaintiff offers no reply to this argument. Accordingly Dr. Lessne's fee should be reduced by 50% to $2,828.00.

Defendant also objects to the expert fees sought regarding Mr. Argiz. The argument regarding a claim of overcharging is adequately rebutted in the reply memo.

Defendant claims that invoice 55554 in the sum of $5,971.00 from Argiz has no documentary backup and therefore should be excluded. That point is not addressed in the reply, and it does not appear that the documentation for this invoice is in the exhibit submitted. Therefore that sum should be deleted. There is also a general argument of a lack of justification for the hourly rates charged for the work done. "There is no explanation of who his [Agriz'] associates are and why they deserve to be paid rates ranging from $110.00, to $165.00, to $210.00, to $255.00 and hour" (page 18 of the opposition memo). That argument, too, is not responded to by plaintiff. While the company retained by plaintiff is well known to the Court, there is nonetheless some merit to defendant's argument. There is additional merit to defendant's argument (again, unresponded to) that many of the time entries are vague and arguably indicate performances of "non-expert" clerical functions. Additionally, though not raised by defendant, a review of the time entries reflects excessive and duplicate billings. By way of example only, on March 21, 2001, three members of said company billed for discussions about the case. Based on all of the above, an expert fee to Argiz in the sum of $35,000.00 is more than reasonable.

Recommendation

Therefore, for the reasons stated herein, it is respectfully recommended as follows:

1. Attorney's fees for Mr. Weissman be awarded in the sum of $343,353.60

2. Attorney's fees for Mr. Freedman and Ms. Rawicz be awarded in the sums of $89,388.75 and $37,917.00, respectively.

3. Attorney's fees for Ms. Hector be awarded in the sum of $637.50.

4. Expert fees for Dr. Lessne be awarded in the sum of $2,828.00.

5. Expert fees for Mr. Argiz be awarded in the sum of $35,000.00

6. Costs and litigation expenses be awarded in the total sum of $25,807.73.[3]

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Paul C. Huck, United States District Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein: *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied,* 488 U.S. 958 (1988).

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[3] This figure takes the total figure of $49,151.73, sought at page 10 of the reply brief and subtracts the computer research and miscellaneous costs addressed, supra.

DONE AND ORDERED this 28th day of March, 2002 at Miami, Dade County, Florida.

/s/ Stephen T. Brown
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Paul C. Huck
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 99-9072-CIV-HUCK-BROWN

STEPHEN PERITZ,

Plaintiff,

vs.

PAINEWEBBER INCORPORATED,

Defendant,

_____/

FINAL FEE AND COST JUDGMENT

(Filed Apr. 30, 2002)

Pursuant to the Order Affirming Magistrate Judge's Report and Recommendation on Plaintiff's Motion for Attorneys' Fees and Costs, entered this date, Painewebber, Incorporated is ORDERED to reimburse Stephen Peritz as follows: $471,296.85 for attorneys' fees; $37,828.00 for experts' fees; and $25,807.73 for costs, for which let execution issue. Post judgment interest shall accrue pursuant to 28 U.S.C. § 1961.

DONE in Chambers, Miami, Florida, this 30th day of April, 2002.

/s/ Paul C. Huck
Paul C. Huck
United States
District Judge

Copies furnished to:
Counsel of Record

FILED
APR 11 2003
OFFICE OF THE CLERK

No. 02-1322

In The

Supreme Court of the United States

STEPHEN PERITZ,

Petitioner,

vs.

PAINEWEBBER INCORPORATED,
A Delaware Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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19 pp

COUNTER STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review an attorney's fees award reducing the lodestar figure by 25% because of petitioner's limited success in terms of the nature and scope of the relief obtained, when that decision rested on the trial court's detailed factual findings, which properly stated and followed the rules of law set forth in this Court's decisions, and was consistent with the reasoning and approach to lodestar reduction in other circuits?

PARTIES BELOW AND PARENT COMPANIES

The Petition states the names of the parties as they have been identified throughout this litigation. In November 2000, PaineWebber Group Inc., the parent of PaineWebber Incorporated, was acquired by UBS AG. Thereafter, in March 2001, PaineWebber Incorporated became known as UBS PaineWebber Inc. UBS PaineWebber Inc. is wholly owned by UBS Americas Inc., which in turn is wholly owned by UBS AG, a publicly traded company.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW i

PARTIES BELOW AND PARENT COMPANIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

A. Factual Background 2

B. Procedural Background 5

REASONS FOR DENYING THE WRIT OF CERTIORARI 6

A. Petitioner's Disagreement With The Eleventh Circuit's Application Of *Hensley v. Eckerhart* Does Not Establish Legitimate Grounds for Granting Certiorari In This Case 6

B. Petitioner's Misinterpretation of *Hensley v. Eckerhart* Underlies This Petition 6

C. The Decisions Below Are Consistent with *Hensley v. Eckerhart* 8

D. The Decisions Below Are Consistent With Those of Other Circuits 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Page

Braxton v. United States, 500 U.S. 344 (1991) 6

Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978) 9

Coutin v. Young & Rubicam, 124 F.3d 331 (1st Cir. 1997) 10

Culebras Ent. Corp. v. Rivera-Rios, 846 F.2d 94 (1st Cir. 1988) 11

Dillard v. City of Greensboro, 213 F.3d 1347 (11th Cir. 2000) 8

Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987) 11, 12

Hensley v. Eckerhart, 461 U.S. 424 (1983) 4, 6, 7, 8, 9

Nephew v. City of Aurora, 766 F.2d 1464 (10th Cir. 1985) 11

Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988) 9, 10

Perkins v. Mobile Housing Board, 847 F.2d 735 (11th Cir. 1988) 8

Popham v. City of Kennesaw, 820 F.2d 1570 (11th Cir. 1987) 9

Sanders v. Brewer, 972 F.2d 920 (8th Cir. 1992) 11

Spanish Action Committee Of Chicago v. City of Chicago, 811 F.2d 1129 (7th Cir. 1987) 11

Villano v. City of Boynton Beach, 254 F.3d 1302 (11th Cir. 2001) 8

Volk v. Gonzalez, 262 F.3d 528 (5th Cir. 2001) 11

Watt v. Alaska, 451 U.S. 259 (1981) 6

Zook v. Brown, 865 F.2d 887 (7th Cir. 1989) 11

STATUTES

18 U.S.C. §§ 1962(b) and 1962(c) 3

18 U.S.C. § 1964(c) 3

28 U.S.C. § 1254 (1) 2

42 U.S.C. § 12101, *et seq* 2, 3

Fla. Stat. § 772.103(2) 3

Fla. Stat. § 772.106 3

No. 02-1322

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN PERITZ,

Petitioner,

vs.

PAINEWEBBER INCORPORATED,
A Delaware Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent PaineWebber Incorporated, now known as UBS PaineWebber Inc., ("PaineWebber") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The per curiam opinion of the Eleventh Circuit is unreported and is contained in the Appendix to the Petition ("Pet. App.") at 1-8. The Order of the United States District Court for the Southern District of Florida affirming the Magistrate Judge's report and recommendations on the award of attorney's fees and costs is contained in Pet. App. 9-10. The report and recommendations of the Magistrate Judge on the award of attorney's fees and costs is unreported and is contained in Pet. App. 13-27.

JURISDICTION

Jurisdiction in the first instance was conferred on the United States District Court for the Southern District of Florida pursuant to the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.* That Court entered a final judgment on April 30, 2002. The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 16, 2002. A petition for rehearing and rehearing *en banc* was denied by order dated January 29, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The Petition accurately sets forth the pertinent statutory provisions.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Stephen Peritz ("Petitioner"), formerly a stockbroker employed by Respondent PaineWebber

Incorporated, now known as UBS PaineWebber Inc., ("PaineWebber") sought relief in the United States District Court for the Southern District of Florida for alleged discrimination based on a disability (a herniated disc) and failure to accommodate his request to work at home. Petitioner requested the full panoply of relief available under the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), including reinstatement, compensatory damages, back pay, front pay and punitive damages, "all in excess of $2,000,000.00." (Pet. App. 2, Pet. 4.)

On May 25, 2000, Petitioner filed an amended complaint adding two counts under federal RICO, 18 U.S.C. § 1964(c), for violation of 18 U.S.C. §§ 1962(b) and 1962(c), one count under Florida RICO, Fla. Stat. § 772.106, for violation of Fla. Stat. § 772.103(2), and one count of fraud. At the end of August 2000, the parties stipulated that the RICO and fraud claims would be submitted to arbitration, limiting trial to the ADA action. Notwithstanding this stipulation, the litigation became, in the words of the Magistrate Judge who presided over both discovery disputes and the attorney's fee motion, "protracted." (Pet. App. 13.) The parties became embroiled in extensive discovery and other disputes about issues of alleged fraud on PaineWebber's part, a number of which appeared to relate more to the RICO and fraud claims than to the ADA claim.

After trial, the jury awarded Petitioner back pay in the amount of $917,000. Petitioner had withdrawn his request for compensatory damages. (Pet. App. 18.) The District Court ruled that, based on the evidence adduced, Petitioner's request for punitive damages would not be submitted to the jury. (Pet. App. 2.) At trial, significant time and testimony was devoted to evidence concerning Petitioner's failure to mitigate his damages, which impacted

on the issue of front pay. Ultimately, the District Court ruled that Petitioner was not entitled to any front pay based on his failure reasonably to mitigate his damages. (Pet. App. 2, 18.) Petitioner unsuccessfully cross-appealed the District Court's rulings barring punitive damages and front pay.

Following trial, Petitioner filed a Motion for Attorney's Fees and to Tax Costs, which is the subject of the Magistrate Judge's Report and Recommendation (Pet. App. 13-27). Using the lodestar method, and following the principles enunciated in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Magistrate Judge reduced the lodestar amount by 25% and awarded Petitioner's attorney's fees in the amount of $471,296.85. He noted that Petitioner had not responded to PaineWebber's contention that lodestar reduction was appropriate in light of Petitioner's unsuccessful claims for front pay, reinstatement, compensatory damages and punitive damages. In this context, the Magistrate Judge also referred to Petitioner's history of ignoring the merits of the ADA case in favor of other issues: "One of the problems herein is that plaintiff's focus has frequently been more in the "sanctions" arena than in the "merits" arena." (Pet. App. 18.) Over objections from both parties, the District Judge affirmed the Magistrate Judge's recommendation, saying the latter had made an "appropriate downward adjustment" of fees and costs, citing as a reason for the amount of attorney's fees the "extensive, contentious" nature of the litigation. (Pet. App. 9.)

Addressing cross-appeals of the attorney's fee issues, the Court of Appeals for the Eleventh Circuit found no abuse of discretion in the lodestar reduction, noting that this Court's *Hensley* decision authorizes fee reductions in cases where a plaintiff has "achieved only partial or limited success" (Pet. App. 6). The Appellate Court cited prior

Eleventh Circuit precedent in which "partial or limited success" was measured by comparing the nature and extent of the relief sought to that which was obtained, and affirmed the District Court's lodestar reduction of 25%. (Pet. App. 6-7.)*

B. Procedural Background

Petitioner filed a Motion for Attorney's Fees and to Tax Costs on July 12, 2001. The Magistrate Judge's Report and Recommendation for disposition of that motion was filed on March 29, 2002. (Pet. App. 13.) The District Judge's Order Affirming the Magistrate Judge's Report and Recommendations was entered on April 30, 2002. (Pet. App. 9-10.) Both parties appealed this Order, and the *per curiam* decision of the Eleventh Circuit Court of Appeals on the attorney's fee issues was entered on October 16, 2002. (Pet. App. 1-8.) Petitioner's Petitions for Rehearing and Rehearing En Banc were denied by order dated January 29, 2003. (Pet. App. 11-12.)

* The Eleventh Circuit did remand in part to the District Court to address a small computational issue. (Pet. App. 8.)

REASONS FOR DENYING THE WRIT OF CERTIORARI

A. Petitioner's Disagreement With The Eleventh Circuit's Application Of *Hensley v. Eckerhart* Does Not Establish Legitimate Grounds for Granting Certiorari In This Case.

Petitioner has brought to this Court his simple disagreement on the facts presented with the relief-oriented approach used by the Eleventh Circuit (and others) to assess the propriety of a lodestar reduction when making an award of attorney's fees. The decisions below correctly state the law as set forth in the seminal case of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and apply that law to the facts of this case in a straightforward and well-accepted manner. The "principal purpose" for this Court's exercise of its certiorari jurisdiction is to "resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). *See also*, *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) (the Court's "certiorari jurisdiction is designed to serve broader purposes than the correction of error in particular cases"). Petitioner has not shown the need for the exercise of this Court's certiorari jurisdiction.

B. Petitioner's Misinterpretation of *Hensley v. Eckerhart* Underlies This Petition.

At the heart of this Petition is Petitioner's misstatement or misunderstanding of well-established law. Petitioner unilaterally concludes that his recovery in this case – limited to back pay -- constituted an "excellent result" as that term is used in *Hensley v. Eckerhart*, 461 U.S. at 435, and therefore could not have constituted "partial or limited

success" as a matter of law. On that basis, he contends it was error to deny him a "fully compensatory fee." Petitioner's unduly narrow reading of the *Hensley* case results in this erroneous legal conclusion.

The discussion in *Hensley* of the "excellent result" that normally warrants "a fully compensatory fee" is given fuller meaning by the very next section of the decision. There, this Court contrasts the "excellent result" scenario with the "partial or limited success" that might render the lodestar amount excessive, "even where the plaintiff's claims were interrelated, non-frivolous and raised in good faith." 461 U.S. at 436-37. The "most critical factor" in deciding whether the lodestar is excessive is "the degree of success obtained." Id. Recognizing that "[t]here is no precise rule or formula for making these determinations," and "the range of possible success is vast," id., this Court in *Hensley* did not attempt to define with specificity the phrases "excellent result" or "degree of success." Rather, it left such "equitable judgment" to the district court's discretion, to be "exercised in light of the considerations we have identified." Id. "This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." Id. at 437 (emphasis added). The wisdom of that observation is well illustrated by the Petition. Overall, the district court's inquiry must focus on "the relationship between the amount of the fee awarded and the results obtained." Id.

Thus, Petitioner would focus exclusively on the significance of his back pay recovery, despite the fact that this Court has held that a reduced fee award "is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Id. at 440. Under

Hensley, Petitioner's back pay recovery cannot be defined as "excellent" as a matter of law in light of the scope of the litigation as a whole. Ibid.

C. The Decisions Below Are Consistent with *Hensley v. Eckerhart.*

While it is improper to reduce fees based on a ratio of successful issues to issues raised, *Hensley*, 461 U.S. at 435 n. 11, this Court has not ordained a single correct method for evaluating the relationship between the fee awarded and the "results obtained," or the relief obtained in the context of the "scope of the litigation as a whole." The significance of the relief obtained in any particular case necessarily is fact and context-specific. In the decisions below, the courts compared the nature and scope of the relief Petitioner requested – in excess of two million dollars in back pay, front pay, compensatory damages, punitive damages, and reinstatement – with the single category of relief he received – back pay. In neither decision did the court use a mathematical formula or ratio, as Petitioner incorrectly suggests. Had they done so, Petitioner undoubtedly would have received a much reduced fee. Rather, both courts relied on a line of Eleventh Circuit authority following *Hensley's* comparative approach. *See Villano v. City of Boynton Beach*, 254 F.3d 1302 (11th Cir. 2001) (remanding for determination of whether plaintiff had obtained excellent results, to be determined in part by considering amount of damages and whether plaintiff achieved full measure of success sought); *Dillard v. City of Greensboro*, 213 F.3d 1347 (11th Cir. 2000) (lodestar adjustment appropriate in Voting Rights Act suit based on limited effectiveness of plaintiff's work); *Perkins v. Mobile Housing Board*, 847 F.2d 735 (11th Cir. 1988) (15% lodestar reduction appropriate where prevailing parties accomplished central

objective of suit but did not obtain all relief sought); *Norman v. Housing Authority City of Montgomery*, 836 F.2d 1292, 1298-1302 (11th Cir. 1988) (tracing evolution of Supreme Court decisions and corresponding Eleventh Circuit authority on this issue); *Popham v. City of Kennesaw*, 820 F. 2d 1570 (11th Cir. 1987) (reducing lodestar 67% where plaintiff sought $2 million in compensatory and punitive damages but obtained $30,000 on one claim of use of excessive force).

Such an approach is entirely consistent with *Hensley*, in which this Court underscored the significance of the "results obtained" factor in a footnoted discussion of *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978). 461 U.S. 438, n.14. The plaintiff in *Brown* had sought reinstatement, lost wages, $25,000 in damages, and expungement of material from her employment record. She obtained lost wages and the expungement, but not the other elements of relief. The District Court declined to award attorney's fees for hours spent on issues as to which relief had not been granted. The Eighth Circuit reversed, minimizing the significance of the "results obtained" factor. This Court took issue with the Eighth Circuit's *Brown* decision, which "understates the significance of the results obtained," and held it "certainly was well within the *Brown* District Court's discretion to make a limited fee award in light of the 'minor' relief obtained." Id.

The decisions below are consistent with this Court's *Hensley* decision in another respect as well. Based on its close involvement with and "superior understanding of the litigation," *Hensley*, 461 U.S. at 437, the District Court's discussion of lodestar reduction referred to Petitioner's attempts to draw fraud and other unrelated issues into the case, suggesting this complicated and expanded the scope of

the litigation. (Pet. App. 18.) These considerations, tied to the court's overall comparison of the relief obtained and the scope of the litigation as a whole, are precisely the types of fact-based "equitable judgments" the *Hensley* decision pointedly leaves to the trial court's discretion.

D. The Decisions Below Are Consistent With Those of Other Circuits.

Petitioner incorrectly argues the existence of a conflict between the decisions below and the First Circuit's decision in *Coutin v. Young & Rubicam*, 124 F.3d 331 (1st Cir. 1997), on the grounds that the latter decision holds that courts may not base a fee reduction on a ratio of damages requested to judgment received. Contrary to Petitioner's erroneous factual contention, however, the decisions below made no such mathematical calculations. Moreover, the *Coutin* decision actually is consistent with the decisions below; it recognizes that a plaintiff may prevail on all claims, "but receive limited (though not insubstantial) redress. In such circumstances, it is appropriate for a trial court to consider the skimpiness of the relief when adjusting the lodestar figure." *Coutin*, 124 F.3d at 339. This is precisely the method utilized by the courts below. The *Coutin* decision also recognizes that assessment of "results obtained" in a case can be made by reference to the plaintiff's success claim by claim, to the relief actually achieved, to the societal right vindicated in the litigation, or a combination of all three. In endorsing the latter approach, *id.* at 338, the First Circuit cites the Eleventh Circuit's decision in *Norman v. Housing Auth. of Montgomery*, 836 F.2d at 1302.

Decisions from many of the Circuit Courts of Appeal demonstrate the prevalence of the relief-oriented approach to evaluating lodestar reductions, even in lawsuits consisting of

single or "common core" claims. In *Spanish Action Comm. of Chicago v. City of Chicago*, 811 F.2d 1129 (7th Cir. 1987), for instance, in which the claims for relief involved a common core of facts, the Seventh Circuit justified lodestar reduction based on many of the same considerations in the decisions below: although the plaintiff received "substantial" compensatory damages, it failed to recover punitive damages, and its prayer for injunctive and declaratory relief was mooted by the city's entering into a consent decree in another action. Overall, therefore, the nature and scope of the relief obtained by the plaintiff was more limited than that sought. Similarly, in *Nephew v. City of Aurora*, 766 F.2d 1464 (10th Cir. 1985), the court held it was not an abuse of discretion to reduce an attorney's fee award where the plaintiff received nominal damages, his claim for punitive damages was unsuccessful, and the injunctive and declaratory relief he sought were unavailable after the dismissal of certain parties at the close of the plaintiff's case. *See also*, *Volk v. Gonzalez*, 262 F.3d 528 (5th Cir. 2001) (where significant injunctive relief awarded at trial reversed on appeal, and monetary relief nominal, lodestar reduced by 50%); *Sanders v. Brewer*, 972 F.2d 920, 923 (8th Cir. 1992) (attorney's fees reduced by 50% for plaintiff who obtained nominal damages but not his requested injunctive or declaratory relief; court noted fee compensation "should not be awarded on a claim-by-claim basis but rather on specific theories of relief."); *Zook v. Brown*, 865 F.2d 887 (7th Cir. 1989) (court evaluated limited declaratory relief obtained in reducing attorney's fees by 75%); *Culebras Ent. Corp. v. Rivera-Rios*, 846 F.2d 94, 102 (1st Cir. 1988) (while plaintiff achieved main objective of suit, making land marketable, but failed to obtain actual injunctive relief and damages requested, lodestar reduced by 50%; district court "much more familiar with the controversy and in a better position to assess plaintiffs' degree of success"); *Greater Los Angeles*

Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987) (in class action under Rehabilitation Act with common core of facts, plaintiffs obtained significant but limited results in light of original relief sought; attorney's fees reduced to 40% of lodestar amount).

In the foregoing cases, each court's assessment of "limited success," for purposes of lodestar reduction, was context-based and fact-specific, thus leading to the particular results. In each case, however, the court endorsed a relief-oriented approach identical to that of the Eleventh Circuit and the District Court in the decisions below. There exists no circuit conflict that warrants granting this Petition.

CONCLUSION

Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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